A **SETARABAKAT SDN BHD v. EVERGREEN HAVEN SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[SUIT NO: 28NCC-966-11-2013]
14 JANUARY 2015

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COMPANY LAW: *Winding-up – Petition – Petition resisted by respondent and contributory – Affidavits in opposition affirmed by contributory – Whether affidavit in opposition on behalf of respondent could be affirmed by contributory as an agent of necessity – Whether trustee had authority to act as agent of necessity – Whether*
C *contributory entitled to oppose petition – Whether personal interest of contributory affected – Whether there was need to send invoices pertaining to amount due as claimed in notice – Whether petitioner's claim must be supported by court's judgment – Whether secured creditor could proceed to wind-up respondent – Whether there was bona fide dispute of debt*

D The petitioner filed a winding-up petition on 7 November 2013 against the respondent based on a notice issued pursuant to s. 218 of the Companies Act 1965 ('CA'). The notice was served on the respondent on 24 September 2013 at its registered address for interest due and owing from 31 December 2009 until 30 June 2013 pursuant to cl. 3 of a relevant agreement executed
E between the petitioner and the respondent. The petition was resisted by the respondent and the contributory of the respondent, one Chan Jit Hoong ('Chan'). Chan, a director on the respondent's board of directors, held one RM1 share of the respondent on behalf of Desaria Land Sdn Bhd ('Desaria') pursuant to a trust deed between Desaria and one Tang Ah Bee @ Tan Ah
F Bee ('Tang'). Both the affidavits in opposition of the petition by the respondent and contributory were affirmed by Chan as an agent of necessity. The petitioner argued that Desaria, the principal of Chan and Tang, had, by virtue of a Board of Directors' Resolution dated 4 November 2013, instructed Chan and Tang to transfer all of the respondent's shares to Desaria and for Desaria to take over all the liabilities of the respondent. However,
G Chan, in breach of the trust deed, failed to comply with the instructions of Desaria. As such, Chan had no authority to act as an agent of necessity. The issues that arose for determination *inter alia* were (i) whether Chan could affirm the affidavit opposing the petition for the respondent as an agent of necessity; (ii) whether Chan could oppose the petition; (iii) whether there was
H a need to send invoices pertaining to the amount due as claimed in the notice; (iv) whether the petitioner's claim must be supported by a court's judgment; (v) whether the petitioner, being a secured creditor, could proceed to wind-up the respondent; and (vi) whether there was *bona fide* dispute on the debt.

I **Held (allowing petition):**

(1) Chen was not an agent of necessity because he was merely a trustee of the one share in the respondent. The beneficiary of the trust through the trust deed created was Desaria and not Chan. Chan was in breach of the

trust deed when he failed or refused to comply with the instructions of Desaria. By filing an affidavit in opposition on the respondent's behalf, Chan had exceeded his authority as one of the trustees for Desaria, the ultimate beneficiary of the respondent. Therefore Chan was not an agent of necessity as he had exceeded the authority given to him. (paras 4, 6 & 8)

(2) Although Chan was a contributory within the definition set out in s. 4(1) of the CA, he was not entitled to oppose the petition as his interest as a contributory was not his personal interest, but instead was an interest which was subject to the terms of the trust deed. A contributory could only oppose a winding up petition as if it affected his own interest. Chan was a mere trustee to the share he was holding in the respondent and had no personal interest even though he was a contributory. He was only a contributory at the behest of Desaria. As such, Chan could not oppose the petition as that right, if any, belonged to Desaria which Chan had disobeyed in the first place. (paras 9 & 11)

(3) The respondents knew that they were obliged to pay interest to the petitioner at the rate of 1.5% above the base lending rate per annum on the credit facility. This was a fixed obligation with full knowledge of the respondent. The sum demanded by the petitioner was only for interest due and owing by the respondent. As the petitioner was not claiming for interest after the dateline of 22 August 2013, there was no prejudice to the respondent even if it was true that the invoices were received late. The interest sum claimed by the petitioner was still due from the respondent whether it received the invoices before or after the deadline for repayment stated in the invoices. As such, there was no need for the invoices to be sent by the petitioner. The notices itself had sufficient particulars to denote what the debt was as claimed against the respondent. (paras 17 & 18)

(4) There was no need for a court's judgment before a notice could be issued and thereafter a winding up petition to be filed. The notice and winding up petition was served to remind the respondent that there was a debt due to the petitioner as a creditor. Despite the creditor being a secured creditor, there was no bar for the same to file the petition to wind-up the respondent and the petitioner was still entitled to present the same. (paras 20 & 21)

(5) Pursuant to cl. 3 of the relevant agreement, the respondent agreed, covenanted and undertook to pay the petitioner at the rate of 1.5% above the base lending rate per annum every six months. The only purported dispute was the alleged calculation of interest on the credit facility advanced by the petitioner. There was no dispute by the respondent or contributory that there was a need to pay interest as required in the agreement. Therefore, based on the amount advanced to the respondent,

A it could not be a *bona fide* dispute that the interest due would inevitably exceed RM500. Even if the contention was that the interest was not as substantial as claimed by the petitioner, there was still no denial that the interest was still above the statutory amount of RM500. (paras 23 & 24)

B **(6)** It did not matter if a company had potential assets that could be realised to meet the debt. The material issue was to ensure that at the point of time when the debt was called, the company facing that debt could settle it without much difficulty. The respondent was still, at the time the notice was issued and immediately thereafter, unable to satisfy the debt. Since there was no payment made by the respondent after the expiry of C three weeks, the presumption by virtue of s. 218(2)(s) of the CA operated against the respondent to deem that it was unable to pay its debt. (paras 31, 33, 35, 36 & 37)

Case(s) referred to:

D *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1984] 2 CLJ 169; [1984] 1 CLJ Rep 482 HC **(dist)***

*Bank Pembangunan Malaysia Berhad v. Elgi Marka Sdn Bhd [1997] 1 LNS 49 HC **(refd)***

*BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 591 HC **(refd)***

*Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd [1989] 1 LNS 170 HC **(refd)***

E *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189 HC **(refd)***

*Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 **(refd)***

*Lin Shoon Jewellers Sdn Bhd v. Kedai Emas Mee Chan Sdn Bhd [2006] 2 CLJ 644 HC **(refd)***

F *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC **(refd)***

*Re Tweeds Garages Ltd [1962] 1 All ER 121 **(refd)***

*Smartframe Sdn Bhd v. Anjung Bahasa Sdn Bhd [2011] 4 CLJ 416 HC **(refd)***

*Textile Gellery Co Ltd (Thailand) v. Pasaraya Gallery Sdn Bhd [2014] 1 LNS 408 HC **(refd)***

G *United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd [1988] 2 CLJ 265; [1988] 2 CLJ (Rep) 511 HC **(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 218(1)(e), (2)(a)

Other source(s) referred to:

H McPherson J, *The Law of Company Liquidation*, 3rd edn, p 54

For the petitioner - Sharon Chong (Amy Hiew with her); M/s Skrine
For the respondent - Bernard Scott; M/s Sault Scott & Co
For the contributory - Venka Arun; M/s Ven & Assocs

I *Reported by Sandra Gabriel*

JUDGMENT

Abu Bakar Jais JC:

Material Facts

[1] The matter before the court is the petition from the petitioner in respect of winding-up the respondent. This petition is based on the notice issued by the petitioner to the respondent pursuant to s. 218 of the Companies Act 1965 ('CA'). It is being presented on the basis of amount of debt due by the respondent to the petitioner. This petition is being resisted by the respondent and the contributory of the respondent, one Chan Jit Hoong ('Chan'). Chan holds one RM1 share of the respondent and also is a director on the respondent's board of directors. He holds the one share of the respondent on behalf of Desaria Land Sdn Bhd ('Desaria') pursuant to a trust deed between Desaria on one part and Chan and one Tang Ah Bee @ Tan Ah Bee ('Tang') on the other. Both the affidavits in opposition of the petition by the respondent and contributory are affirmed by Chan. Chan states in respect of the affidavit in opposition by the respondent, he is affirming it for the respondent as he acts as an agent of necessity.

Identifiable Issues

[2] The issues arising from the arguments of the parties to the petition are as follows:

(a) whether Chan can affirm the affidavit opposing the petition for the respondent as agent of necessity;

(b) whether Chan can oppose the petition;

(c) whether there is a need to send the invoices pertaining to the amount due as claimed in the notice;

(d) whether the petitioner's claim must be supported by a court's judgment;

(e) whether the petitioner being a secured creditor could proceed to wind-up the respondent;

(f) whether there is *bona fide* dispute on the debt;

(g) whether there is a presumption the respondent is unable to pay its debt; and

(h) whether the alleged motive of the petitioner in filing the petition is relevant.

[3] I shall now address and make the findings on the issues raised as narrated below.

Whether Chan Can Affirm The Affidavit As Agent Of Necessity

[4] As explained, in affirming the affidavit to oppose the petition for the respondent, Chan says he is doing so as an agent of necessity. The doctrine of agent of necessity is premised on the notion that the agent must act on

behalf of the principal as it is necessary to do so at any particular time. In this case thus the question arising is whether Chan is an agent of necessity. At the outset, I will express the finding he is not because he is merely a trustee of the one share in the respondent. The beneficiary of the trust through the trust deed created is Desaria and not Chan.

[5] Further there is evidence that Desaria, the principal of Chan and Tang, has by virtue of a board of directors' resolution on 4 November 2013 instructed Chan and Tang to transfer all of the respondent's shares to Desaria and for Desaria to take over all the liabilities of the respondent and for them to appoint Mr Chin Wai Fong, Madam Loke Lee Luan, Mr Cheah Kah Seng and Mr Choy Heng Min @ Choy Hing Ming as directors of the respondent and for the resignation of Chan and Tang as directors of the same.

[6] However, Chan, in breach of the trust deed, refused or failed to comply with the instructions from Desaria. As such, Chan's conduct in filing this affidavit in opposition to the petition on behalf of the respondent is not according to the instruction of Desaria the beneficiary of the respondent and therefore is filed without authorisation.

[7] Further, it must be noted that the board of directors of Desaria Land had resolved to take over all the liabilities of the respondent.

[8] By filing an affidavit in opposition on the respondent's behalf, Chan exceeded his authority as one of the trustees for Desaria, the ultimate beneficiary of the respondent. Instead of complying with the instructions of Desaria, Chan completely disobeyed the direction given. Therefore Chan is not an agent of necessity as he has exceeded the authority given to him. In this regard the facts of the decision in the case of *Avel Consultants Sdn Bhd & Anor v Mohd Zain Yusof & Ors* [1984] 2 CLJ 169; [1984] 1 CLJ Rep 482 relied by Chan must be distinguished as in that case there is no direction similarly given to the party asserting he has the right to act as an agent of necessity. There is also in that case majority shareholding for the party asserting to act as agent of necessity. This is not the case here where Chan does not own majority shares.

Whether Chan Is Entitled To Oppose The Petition

[9] Although Chan is a 'contributory' within the definition set out in s. 4(1) of the CA, he is not entitled to oppose the petition as his interest as a contributory is not his personal interest, but instead is an interest which is subject to the terms of the trust deed.

[10] In this regard it is clear that Desaria is the beneficiary of the one share which Chan holds in the respondent. As stated earlier Desaria had instructed Chan to transfer the one share held by him to Desaria and that Desaria will take over all liabilities of the respondent. However, Chan has wilfully refused to do so.

[11] Further a contributory can only oppose a winding-up petition if it affects his own interest as decided in the case of *Lin Shoon Jewellers Sdn Bhd v. Kedai Emas Mee Chan Sdn Bhd* [2006] 2 CLJ 644. Therefore Chan as a mere trustee to the share he is holding in the respondent has no personal interest even though he is a contributory. He is only a contributory at the behest of Desaria. He cannot oppose the petition as that right if any belongs to Desaria which he had disobeyed in the first place.

[12] One would realise the findings as I have elaborated on these two initial issues alone, would mean the petition has the effect of not being resisted and should be allowed. However in abundance of caution, I shall also deliberate on the other issues raised to show that the arguments to contest the petition as a whole is still tenuous.

Whether There Is A Need To Send The Invoices Pertaining To The Amount Due As Claimed In The Notice

[13] The petition was filed on 7 November 2013 pursuant to the notice issued which was served on 24 September 2013 on the respondent at its registered address, for the sum of RM884,654.54, being the interest due and owing by the respondent to the petitioner, as at 30 June 2013, pursuant to cl. 3 of the relevant agreement between the petitioner and the respondent. There is no dispute on this fact.

[14] In the affidavit opposing the petition, the respondent and Chan aver that the letter and invoices sent by the petitioner were not addressed to the respondent's registered or business address.

[15] On this contention, the relevant agreement are clear on the parties' obligations under the same. Clause 1 provides that:

> In consideration of SSB [the petitioner] at the request of EHSB [The respondent] having agreed to advance credit facility up to Ringgit Malaysia Three Point Five Million (RM3,500,000.00) only or have advanced part thereof to EHSB, EHSB hereby agree covenant and undertake to repay to SSB the said credit facility of Ringgit Malaysia Three Point Five Million (RM3,500,000.00) only or any part thereof released (hereinafter referred to as "the Credit Facility") subject to the following terms.

[16] While cl. 3 states that:

> EHSB [the respondent] agree covenant and undertake to pay interest to SSB at the rate of one point five per cent (1.5%) above the base lending rate for the time being of Malayan Banking Berhad per annum on the Credit Facility or any part thereof advance to EHSC. Such interest shall be paid by EHSB to SSB every six (6) months commencing from the date the Credit facility or any part thereof is advance.

[17] Thus the respondent knew that they were obliged to pay interest to the petitioner at the rate of 1.5% above the base lending rate per annum on the credit facility, which is the sum of RM3,500,000, every six months. This is

A a fixed obligation and the respondent had full knowledge of it. In any event, the respondent and Chan were furnished with the invoices, together with the breakdown of the loan principal and interest, sometime in the middle of September 2013, as admitted by Chan in both the respondent's affidavit and the contributory's affidavit. In addition, the sum demanded by the petitioner
B is only for interests due and owing by the respondent from 31 December 2009 until 30 June 2013. As the petitioner is not claiming for interest after the dateline 22 August 2013, there is no prejudice to the respondent even if it is true the invoices were received late. Therefore the interest sum claimed by the petitioner is still due from the respondent
C whether it received the invoices before or after the deadline for repayment stated in these invoices.

[18] Therefore there is no need for the invoices to be sent by the petitioner. Further, the notice itself has sufficient particulars to denote what the debt is as claimed against the respondent.

D **Whether The Petitioner's Claim Must Be Supported By A Court's Judgment**

[19] The respondent and Chan say there is no judgment obtained for the interest sum claimed and therefore the petitioner should claim by way of a
E civil suit.

[20] This submission cannot hold water as there is no need for a court's judgment before the notice could be issued and thereafter a winding-up petition is filed. The notice and winding-up petition served to remind the respondent that there is a debt due to the petitioner as creditor. A court's
F judgment is unnecessary as established by the Court of Appeal in the case of *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817 where it states:

> … a creditor is not required to obtain a judgment before serving a statutory demand … (*The Law of Company Liquidation* (4th Ed), by Andrew
G R Keay at p. 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding-up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p. 91).

Whether The Petitioner Being A Secured Creditor Could Proceed To Wind-
H **Up The Respondent**

[21] Both respondent and Chan as contributory contended that the petition is unsuitable because the petitioner is a secured creditor. It is admitted the petitioner has a lien holder's caveat over the respondent's properties. However, despite the petitioner being a secured creditor, there is no bar for
I the same to file the petition to wind-up the respondent and the petitioner is still entitled to present the same. (see *United Asian Bank Bhd v. Hong Huat Realty (M) Sdn Bhd* [1988] 2 CLJ 265; [1988] 2 CLJ (Rep) 511; [1987] 2 MLJ 502).

Whether There Is *Bona Fide* Dispute On The Debt

[22] It is trite law in order to oppose a winding-up petition, the respondent and the contributory here must raise a *bona fide* dispute. It must be honestly believed to exist and must be based on substantial or reasonable grounds (see *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591 and *Textile Gellery Co Ltd (Thailand) v. Pasaraya Gallery Sdn Bhd* [2014] 1 LNS 408; [2014] 2 AMCR 521).

[23] In this regard, one only needs to look at the terms of the relevant agreement executed by the respondent and the petitioner to see there can be no *bona fide* dispute on the debt due. Pursuant to cl. 3 of that agreement, the respondent agrees, covenant and undertake to pay the petitioner interest at the rate of 1.5% above the base lending rate per annum every six months. The only purported "dispute" is the alleged calculation of interest on the credit facility advanced by the petitioner. There is no dispute at all and there is no denial by the respondent or contributory that there is a need to pay interest as required in the agreement.

[24] Therefore based on the amount advanced to the respondent, it cannot be a *bona fide* dispute that the interest due would inevitably exceed RM500. Even if the contention is that the interest is not as substantial as claimed by the petitioner, there is still no denial that the interest is still above the statutory amount of RM500.

[25] The case of *Smartframe Sdn Bhd v. Anjung Bahasa Sdn Bhd* [2011] 4 CLJ 416 involves submission that the calculation of interest was wrong. Despite that submission, the case decided:

> If the respondent says that they are not indebted to the petitioner, the respondent has to provide an explanation as to why they are not so indebted in the sum claimed by the petitioner. It is not enough for the respondent to merely deny their indebtedness or to aver that the petitioner's claim is false.

[26] Taking note of this case, likewise in the present case before this court, there is no attempt by the respondent or the contributory to show what is the correct calculation of interest.

[27] *Smartframe* (*supra*) also ruled that so long as the petitioner's claim is more that the statutory requirement of RM500, the petitioner is entitled to present the petition and referred to the English case of *Re Tweeds Garages Ltd* [1962] 1 All ER 121 where it states:

> … where there was no doubt that petitioners were creditors for a sum which would otherwise entitle them to a winding-up order, a dispute as to the precise amount owed was not a sufficient answer to the petitioner and according a winding-up order would be made.

[28] The Federal Court case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437; [2000] 4 MLJ 657, dealt with the interpretation of s. 218 of the CA and the issuance of the notice under the same provision. The Federal Court held that a notice of demand under s. 218(2)(a) need not indicate the exact sum due as at the date of demand so long as the sum due exceed RM500 and remained unpaid after a demand made without any reasonable explanation.

[29] In this regard the respondent and contributory do not dispute the existence of the debt, as it was admitted that "interest was chargeable and claimable by the petitioner against the respondent every six (6) months".

[30] In contesting the winding-up it is also contended that the two pieces of land owned by the respondent (Geran Mukim, No. Hakmilik: GM 203, Lot 3571, Mukim 18, Daerah Timor Laut, Negeri Pulau Pinang and No. HS (M): 348, No PT: Lot 10001, Mukim 18, Daerah Timor Laut, Negeri Pulau Pinang can be sold in the open market and realised without much difficulty and that the total sum due and payable is only a fraction of the value of the lands.

[31] What is to be appreciated regarding this submission is that in law it does not matter if a company has potential assets that can be realised to meet the debt. What is material instead is to ensure that at the point of time when the debt is called, the company facing that debt could settle it without much difficulty.

[32] A case in point on this proposition is *Lafarge* (*supra*) where it referred to the case of *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1989] 1 LNS 170; [1990] 1 MLJ 21 on the interpretation to the phrase 'unable to pay its debts' appearing in s. 218(1)(e) of the CA as explained by McPherson J in *The Law of Company Liquidation* (3rd edn.), at p. 54 as follows:

> The phrase 'unable to pay its debts' is susceptible to two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense – *that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full*. (emphasis added)

[33] Following the above passage, it is immaterial the respondent in the present case owns lands with a value much higher than the debt due. The respondent is still at the material time when the notice was issued and immediately thereafter, unable to satisfy the debt.

[34] Therefore on the facts of the present case before this court, I hold there is no *bona fide* dispute on the debt that can be shown either by the respondent or contributory.

Whether There Is A Presumption That The Respondent Is Unable To Pay Its Debt

[35] There is a presumption of insolvency when s. 218(2)(a) of the CA is taken into account. This provision reads:

> A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; ...

[36] In this regard if the debt due above RM500 is demanded and there is no settlement or payment made towards satisfying the debt within three weeks of such demand, the presumption is raised that the company is indeed unable to pay the debt. (see *Bank Pembangunan Malaysia Berhad v. Elgi Marka Sdn Bhd* [1997] 1 LNS 49; [1998] 5 MLJ 504).

[37] In the present case, the petitioner had served the notice on the respondent and after three weeks there was no payment made by the respondent. Thus the presumption by virtue of the statutory provision mentioned, operates against the respondent to deem that it is unable to pay the debt.

Whether The Alleged Motive Of The Petitioner In Filing The Petition Is Relevant

[38] The respondent and the contributory alleged the petition is filed with the intention to defeat the rights of the minority and the petitioner action is *mala fide*. It is also alleged that the whole proceeding is an oppressive act by the petitioner.

[39] First I find the respondent and contributory do not offer credible evidence to prove the allegations against the petitioner. Second, these allegations are actually irrelevant on the core issue whether there is a debt due above RM500 which has been demanded and not paid within 21 days of the demand. A creditor, in this case the petitioner, who is not paid has a right to file a petition for a winding-up irrespective of the alleged accusations against the same or the motives as to why the petition is filed.

[40] Following from there, in deciding a winding-up petition on the basis of s. 218(1)(e) of the CA, the sole question before the court is whether the respondent is unable to pay its debt. Therefore, the allegations of the

respondent and the contributory as noted earlier are not relevant. In this regard the High Court in the case of *Kampat Timber Industries Sdn Bhd v. Bensa Sdn Bhd* [1990] 1 CLJ 292; [1990] 2 CLJ (Rep) 189; [1990] 2 MLJ 46 held:

> As has been established and well settled, the sole issue before the court is whether the respondent is unable to pay its debt and therefore should be wound up. I am of the view on the facts before me, the evidence is overwhelming that the respondent is unable to pay its debts. In so determining, I am entitled to take into consideration contingent and prospective liabilities. The respondent has to pay $2.3m consisting of supporting creditors. The objection taken before me is not that the respondent has the capacity to pay its debts. They were on other issues not central to the issue before me.

Conclusion

[41] Based on the foregoing, I do not agree that the respondent and the contributory had contested the petition because both affidavits in opposition to the same had been affirmed by Chan, who I have explained is not in the position to do so for the reasons elaborated. Nonetheless even when these affidavits of the respondent and contributory are considered, both had failed to rebut the presumption the respondent is unable to pay the debt due to the petitioner.

[42] On the other hand I am satisfied that the petitioner has proven its case for the winding-up of the respondent and the issues raised is also decided in favour of the petitioner.

[43] The petition to wind-up the respondent is therefore allowed.